IN THE

United States Circuit Court of Appeals,

NINTH CIRCUIT.

October Term, 1891.

No. 16.

STANDARD OIL COMPANY (A CORPORATION),
Appellant,

VS.

THE SOUTHERN PACIFIC COMPANY (A CORPORATION) AND WHITTIER, FULLER & CO. (A FIRM),
Appellees.

SUPPLEMENTAL BRIEF FOR APPELLEE.

Whittier, Fuller & Co.

Filed by

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STANDARD OIL COMPANY OF IOWA, *Complainant and Appellant,* vs. SOUTHERN PACIFIC COMPANY AND WHITTIER, FULLER & CO., *Respondents and Appellees.*	No. 16.

Supplemental Brief of Appellee.

In their brief filed herein, counsel for appellant presents, *for the first time* since their Honors, Judges Sawyer and Sabin, made the order requiring complainant to make Whittier, Fuller & Co. corespondents with the Southern

Pacific Company, the question as to whether or not the Court erred in making that order. We therefore claim the right to answer that argument in a supplemental brief, because our main brief was already printed when appellant's brief was served on us.

ARGUMENT.

Counsel for appellant claims that the original bill filed by appellant "was not aimed at Whit-" tier, Fuller & Co., or against any particular " owner or patentee of cars. *Its object and scope* " *was simply to enjoin the railroad company from* " *using cars which would amount to an infringe-* " *ment of complainant's patent.*"

In other words, they maintain that a complainant can bring a suit *on general principles* against a respondent, for infringing upon a patent, and demand an injunction and accounting, without charging any specific infringement, but by one sweeping complaint cover any and all possible acts of infringement that the respondent might have theretofore committed or might thereafter commit, and that no individual person who claims a right in any one of the acts relied upon to establish an infringement will have a right to be heard in the premises.

This proposition is so utterly contrary to law and reason that it destroys itself. Such a rule would result in the denial of a substantial right that every citizen has guaranteed to him by the Constitution of the United States, viz: the right to defend his property whenever his right is assailed.

The respondent named in the original complaint filed by appellant was a railroad company, a common carrier. Its duty under the law is to carry such freight or passengers as may be presented to it. It has no right to discriminate against freight or persons. If it accepts oil cars from one person or corporation, under its charter as a common carrier, and hauls them over its lines, it is bound to do the same for another person or corporation.

The sworn answer of the respondent, the Southern Pacific Company, to the original complaint, says:

"And for a further, separate and distinct an-
" swer and defense, defendant avers that it is a
" common carrier for hire; that as such *it is*
" *accustomed to receive and transport over its rail-*
" *road, cars belonging to other corporations and*
" *individuals;* that under the laws of the United

" States it is required to receive all cars, without " discrimination, and transport the same, etc."

(See answers of Southern Pacific Co., p. 6, Record.)

Consequently a sweeping complaint such as counsel for appellant insists on, if it were permissible, would enable a single patentee to effectually bar out all competing devices, if it could induce the railroad company to submit to a decree under such complaint, because the railroad company could then shelter itself behind the decree of the Court, and thereby nullify the Federal law that required it to " receive all cars without " discrimination." Under counsel's theory the party most affected by such proceeding, viz: the owner or owners of the cars enjoined, would have no right to appear, but would be at the mercy, wholly and absolutely, of the railroad company, without recourse.

In *Lightner* vs. *Kimball*, 1 Lowell, 211, the Court held:

" Where the general agent of a transportation " company transported, under contract, rolling " stock having the infringing device, *but over* " *the selection or equipment of which he had no*

" *control*, held, that he was a mere stranger to " the infringement, and not liable therefor."

The cars of Whittier, Fuller & Co. belonged to them and not to the railroad company. Whittier, Fuller & Co. were using the cars when the Southern Pacific Company was hauling them, and such hauling cannot be said in any sense to be a use *by the railroad company*.

Whittier, Fuller & Co. built the cars. The railroad company *had no right of selection or equipment of those cars*. Its sole duty was to haul them from one place to the other. Under such circumstances the railroad company itself could no more be an infringer than could its superintendent in *Kimball* vs. *Lightner*.

We contend, therefore, and have so contended through all this litigation, that the Southern Pacific Company should have had this case dismissed against it, and the very fact that it did not do so, *or attempt to do so* under the decision in *Kimball* vs. *Lightner*, but insisted upon remaining in as a defendant, was evidence to our mind that this whole litigation was a cunningly gotten-up scheme—in fact a conspiracy—to give the Standard Oil Company a monopoly of the oil-carrying trade on this Coast.

Counsel's theory, exposed now for the first time in this suit, lends almost certainty to our former suspicion and charge that the suit was a skillfully laid plan and scheme to injure and destroy Whittier, Fuller & Co. so far as their oil trade was concerned.

The fact remains, however, that Whittier, Fuller & Co's oil cars were the only other oil cars transported by the Southern Pacific Company that could in any sense interfere with the complainant's oil cars. The only other oil cars hauled by that company were the old style tank-cars, and these, it is admitted by complainant, did not interfere with their alleged patented car because it cost $95 a trip more to haul oil in those cars than in the combination cars.

It is also a fact that the preliminary injunction issued by the Court at the time the original complaint was filed tied up Whittier, Fuller & Co's cars on the road, *and did not tie up anybody else's cars.*

Consequently Whittier, Fuller & Co's cars were the alleged infringements, at which this suit was directed. It was their property that was being destroyed by the conjoint action of the

complainant and respondent in the original complaint; *aggressive* action by the complainant and *quiescent* action by the respondent.

These facts were all apparent to Judges Sawyer and Sabin, who were sitting together on the bench when Whittier, Fuller & Co's petition was heard.

Whether Whittier, Fuller & Co's petition was *absurd* as a "petition for interpleader" or not it contained sufficient facts, or statements of facts, to inform the Court that Whittier, Fuller & Co's rights were involved in the suit; that their property was jeopardized and destroyed by proceedings growing out of the suit, and his Honor Judge Sawyer remarked at the time he made the order that the petition for interpleader was probably not the proper method of presenting the matter to the Court, but that it contained sufficient facts to warrant the Court in ordering that Whittier, Fuller & Co. be made defendants, and the order was consequently made.

The petition is found on pages seven, eight and nine, transcript, and the Court will see that it contains all the facts necessary to induce the Court to require Whittier, Fuller & Co. to be made codefendants with the Southern Pacific

Company, and it is immaterial by what name that petition is named; whether it be called a petition for interpleader, a petition for intervention, or a petition to be allowed to come in as a defendant. The petition shows that Whittier, Fuller & Co. were being injured by the proceedings in the suit; that their property was tied up by the injunction, and that Whittier, Fuller & Co. believed the suit was a collusive suit instituted and prosecuted for the express purpose of destroying their property. Upon this petition, by whatever name it is called, the lower Court was undoubtedly justified in making its order of the ninth day of December, 1889.

But counsel asks, page 28 appellant's brief: "Can stranger to the record object that there "is a defect of parties respondent to the bill?" We ask, Why not? It is unquestioned that a court of equity may, in order to secure a complete determination of the controversy, order other parties brought in and made either plaintiffs or defendants.

Pomeroy on Remedies, sec. 419.

Code of N. Y., sec. 122.

Code C. C. P. Cal., sec. 389.

Pomeroy on Remedies, edition 1876, in discussing this question at page 454, refers to three classes of persons who may be made parties in a pending litigation. In the first class he includes " those whose rights are so bound up with " the rights of the parties to the record that " they cannot be ascertained and fixed without " at the same time ascertaining and fixing the " rights of the others also, and to do this these " others must of course be before the court."

And at section 419 on page 455, in referring to this class, he says:

" Sec. 419. If the case comes within the first- " described condition, that is, if there are other " persons, not parties, whose rights must be " ascertained and settled before the rights of the " parties to the suit can be determined, *then the* " *statute is peremptory; the Court must cause* " *such person to be brought in;* it is not a matter " of discretion but of absolute judicial duty." Citing:

Davis vs. *The Mayor*, 2 Duer, 663; 3 Duer, 119.

Shaver vs. *Brainard*, 29 Barb., 25.

Sturtevant vs. *Brewer*, 9 Abb. Pr., 414.

Mitchell vs. *O'Neale*, 4 Nev., 504.

Jones vs. *Vantress*, 23 Ind., 533.
Johnson vs. *Chandler*, 15 B. Mon., 584.
Johnston vs. *Neville*, 68 N. C., 177.
Whitted vs. *Nash*, 66 N. C., 590.

In *Horn* vs. *Volcano Water Co. et al.*, reported in 13 Cal., page 71, Shaffer and others petitioned to be allowed to intervene on the ground that they were judgment creditors, having liens by their several judgments upon the mortgaged premises involved in the litigation.

In discussing the question as to whether or not they could be brought in as parties to the suit his Honor, Judge Field, said, on page 71, *supra:*

"The petition of Shaffer and others stands "upon a different footing. It shows that they "were judgment creditors, having liens, by their "several judgments, upon the mortgaged prem- "ises at the time of the institution of the pres- "ent suit. As such they were subsequent "encumbrances and necessary parties to a com- "plete adjustment of all interests in the mort- "gaged premises, though not indispensable "parties to a decree determining the rights of "the other, parties as between themselves.

" *For such adjustment the Court would have been* " *justified in ordering them to be brought in,* " *either upon their own petition, as in the present* " *case, or by an amendment to the complaint.*" Citing:

Sargent vs. *Wilson*, 5 Cal., 504.

Moss vs. *Warner*, 10 Cal., 296.

Montgomery vs. *Tutt*, 11 Cal., 307.

In *Buck* vs. *Webb*, reported in 2 West. C. R., 399, the Court said:

" It is true that the interests of such persons " cannot be *injuriously* affected thereby, but " courts of equity have the power to protect by " reservation or limitation in their decrees the " rights of individuals who appear to be inter- " ested, even though they be not parties to the " action.

" *The usual and proper course is to continue* " *the cause until such persons can be made par-* " *ties, and their rights adjudicated. Many in-* " *stances exist where this must be done.*"

See also *Lytle Creek Water Co.* vs. *Perdue*, 1 W. C. R., 867.

It is therefore apparent that the learned judges who ordered that Whittier, Fuller & Co. be made defendants acted not only within their power, but performed an actual duty in doing so.

We disagree with counsel for appellant when he asserts that "no rule of law requires a com-" mon carrier to receive and transport cars built " and owned by private persons."

Section 3 of the *Interstate Commerce Act* provides that it is unlawful for a common carrier " to make or give any undue or unreasonable " preference or advantage to any particular *per-* " *son*, *company*, *firm*, corporation or locality, *or* " *any particular description of traffic.*"

If this does not furnish a rule of law requiring common carriers to receive and transport cars built and owned by private shippers where it has been confessedly in the habit of doing the same for others we are unable to understand what it does aim at, or require. According to our understanding this third section was intended for the express purpose of covering this identical case.

The *Express Cases*, 117 U. S., 1, referred to by counsel, is an entirely different case from the one we are discussing. That was a case where the

express companies contended for privileges *on board of the railroad company's cars.* It was a question whether the railroad company was bound to provide the same facilities and advantages *on board its cars* for all express companies, and the decision in that case does not, even by analogy, furnish an authority in a case where the question is one of freight merely, because the oil cars in this case were carried merely as freight and where the custom is admitted by the railroad company.

Respectfully submitted,

JNO. L. BOONE.